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Supreme Court of the United States.

OCTOBER TERM, 1971.

No. 70-342.

GEORGE K. MacPHERSON,
Petitioner,

v.

BOSTON AND MAINE CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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STATUTE.

45 U.S.C. sections 51 et seq. 2 et seq.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

There was no opinion in the United States District Court for the District of Massachusetts.

The opinion of the Court of Appeals for the First Circuit has been annexed to the petition.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

1. Was there any evidence of the negligence of the respondent which contributed to the happening of the accident?

Statutes Involved.

45 U.S.C. sections 51 *et seq.*

Statement of the Case.

This case is before the court on the petitioner's appeal from a judgment for the defendant entered by the Court of Appeals for the First Circuit on March 31, 1971, which reversed the judgment of a District Court entered as a result of a jury verdict for the plaintiff in the amount of $17,500.

This is a petition seeking a review of the judgment of the Court of Appeals. The evidence introduced at the trial may be summarized as follows:

At the time of the accident the plaintiff was a freight conductor on Train B21, B22. This train was a local freight, distributing cars between Boston and Salem. The plaintiff was in charge of the train. Between Somerville and the Sylvania plant there were a number of manual public crossings which had to be protected by a flagman or member of the crew. The Loring Avenue crossing was one of these and the practice there was for the engine to stop back clear of the crossing; the head brakeman would then get out with a flag, stop the traffic and give the train a signal to proceed. In order to proceed back from the Sylvania plant to Somerville, the train would be pushed with the caboose on the west end of the train. The train would back up until it got to Loring Avenue, within a car length, 35 to 40 feet, where it would be stopped. On the day of the accident, the train was heading back from the Sylvania plant and the plaintiff stopped the train at Loring Avenue about one car length back from Loring Avenue. The train was stopped so that the crew could go over to the Loring Avenue Diner for lunch. Plaintiff got off the caboose on the south side,

turned and climbed over a bank of snow. When he got to the top of the banking, his leg twisted and he fell down, sustaining the injuries complained of. Early in January there had been a couple of snow storms, also one in the third week of January. There was also a storm three or four days prior to the accident. Just east of the crossing, on both sides, there was a bank of snow about 50 feet from the crossing. There was another bank of snow about 10 or 12 feet from the crossing with about 6 inches of snow on the left. The distance in feet from the closer snow bank to the crossing was about 12 feet.

The snow pile that the plaintiff fell on was located at least 12 feet from the crossing. As the person in charge of the train, the plaintiff was the one who said where it was to stop and where it was to start up and go. On the day of the accident, the plaintiff was in the caboose on the back platform in the most forward part of the train moving toward the crossing. Two brakeman were on the platform with him. If they were not going to stop for coffee that morning and if they were going through the crossing, one of the brakemen, after the train was stopped, would have been sent up ahead to the crossing with a flag to stop traffic. The plaintiff would not have been one of these men because he was the conductor.

Although a rule was introduced into evidence requiring the train to stop within 50 feet of a crossing, the plaintiff could, if he wanted to after the train had stopped, signal the engineer to move the train ahead on to the public crossing, or he could have signaled the engineer to pull it off the public crossing. On the day of the accident the plaintiff was aware that there were two piles of snow in the area just to the left of the train.

When the plaintiff got off the caboose he took two or three steps until he got to the snow bank. If he had taken one step to his right, he would have been in the bed between the rails of the track.

When moving freight trains to the side of buildings, it is sometimes necessary to line up the doorway on the freight car with the doorway of the building. There was no question but that the plaintiff could have moved his train, once it stopped for this crossing, ahead another foot, six inches or ten feet. There was no limitation on the distance he could have moved the train ahead or back.

The following railroad rules were introduced into evidence:

Rules for the Government of the Operating Department of the Boston and Maine Railroad dated October 29, 1961.

> "Rule 103. When cars are being pushed by an engine and the conditions require, a trainman must take a conspicuous position on the leading car and when shifting over public crossings, the grades not protected by a watchman, by gates or crossing signals, in the operation a member of the crew must protect the cars."

Rules for the Government of the Operating Department for the Prevention of Personal Injuries—The Boston and Maine Railroad, dated July 11, 1963.

> "Rule S46. Employees must not cross tracks close to engine or cars. Always walk far enough away, at least 10 feet from engine or cars so that in case they start suddenly, there will be ample time in which to get off the track in safety.
>
> "Look for and avoid trains, engines or cars that may be approaching on the next track."

Timetable No. 12—Boston and Maine Corporation effective October 31, 1969.

> "All moves over crossings must be stopped within 50 feet of the crossing and a member of the crew to protect it."

Reasons for Denying the Writ of Certiorari.

The Court of Appeals has not decided a federal question in a way which is in conflict with applicable decisions of this Court.

The basis of liability under the Federal Employers' Liability Act is negligence which, in whole or in part, is the proximate cause of the plaintiff's injury. *Albertson* v. *Chicago and St. Paul Railway Company,* 242 Minn. 50, 64 N.W. 2d 175, 42 A.L.R. 2d 1044. An employer's liability is to be determined under the general rule which defines "negligence" as lack of due care under the circumstances or failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation, or doing what such person under existing circumstances would not have done. *Sheaf* v. *Minneapolis, St. Paul & S.S.M.R. Co.,* 162 F. 2d 110. A Federal Employers' Liability Act plaintiff cannot carry his burden of proof without evidence that the negligence of the defendant was real. There has been no departure from the familiar and normal requirements of federal jurisprudence that the party with the burden of proof must present facts from which negligence and the causal relationship could be reasonably inferred. *Dessi* v. *Pennsylvania Railroad Co.* (1958, C.A. 3, Pennsylvania), 251 F. 2d 149; cert. den. 356 U.S. 967, 2 L. Ed. 2d 1073, 78 S. Ct. 1006. It seems perfectly clear that, considering all of the evidence in this case, the mere presence of snow piles in the vicinity of the crossing is not evidence of the defendant's negligence. It is hardly necessary to point out that heavy accumulations of snow must be plowed in the vicinity of railroad crossings such as the one in question and that the plowing of snow creates piles. To eliminate such snow piles from the vicinity of the tracks it would be necessary to plow the roadbed parallel to the tracks and such a requirement is clearly unreasonable. It is submitted that what is reasonable was

done in this case. The snow was plowed from the street crossing and back along the tracks for a distance of about 12 feet (Tr. 30). How far back from the crossing should the snow have been pushed when it is clear that trains using the crossing could be stopped anywhere the conductor required? Similarly there was no evidence showing that it was practical or possible to move the snow any farther back from the tracks in the place where the accident occurred. Exhibits 2 and 4 clearly show a substantial retaining wall in back of the snow piles which would clearly limit the amount of snow that could be pushed in that direction. What the exhibits also show is a reasonable clearing of the snow from the area of the crossing which would permit both the use of the crossing and obstruction-free access to the crossing by employees of the defendant entering and leaving trains stopped at the crossing. It is submitted that the defendant could not reasonably have foreseen that a snow pile 12 feet back from the crossing, and situated as the snow pile in question was situated, would be hazard in view of the fact that it was admittedly possible to stop the trains in front rather than behind the snow pile (Tr. 30), and because an easy, clearly defined, access route to the crossing existed which would have permitted the plaintiff to avoid the snow pile (Tr. 55).

It is apparent, both from the exhibits and from the plaintiff's testimony (Tr. 55), that he had a clear, unobstructed path to the crossing. It has been held that where an employee leaves a safe route which has been provided by his employer as a means of ingress and egress for his employees, and, instead, chooses a dangerous one and is injured while traveling thereon, he is not within the protection of the Federal Employers' Liability Act. *Hoyer* v. *Central Railroad Co. of New Jersey* (1918, C.A. 2, New York), 255 Fed. 493; *Krysiak* v. *Pennsylvania Railroad Co.* (1921, C.A. 3, New Jersey), 270 Fed. 758.

It is submitted that there was no evidence of the defendant's negligence for the further reason that the snow pile upon which the plaintiff fell was not the cause of the plaintiff's accident. The landmark case on causation is *Rogers* v. *Missouri Pacific Railroad Co.* (1957), 352 U.S. 500, 509, 1 L. Ed. 2d 493, 77 S. Ct. 443; reh. den. 353 U.S. 943, 1 L. Ed. 2d 764, 77 S. Ct. 808. In that case, a railway employee sought recovery under the Federal Employers' Liability Act for injuries sustained by him while he was engaged in burning leaves from a railway right-of-way with a hand torch. Upon noting the approach of a train the employee left the tracks to a point near a culvert, in compliance with his employer's orders, to observe the passing train; the passing train fanned the flames from the burning leaves which caused the fire to spread and the employee, in retreating from the place in which he was standing in order to avoid the flames, fell from the top of the culvert. The United States Supreme Court, expressing the view of five members, reversed a decision of a Supreme Court of Missouri that the employee's evidence did not support a finding of employer liability. In connection with the question of proximate cause the United States Supreme Court pointed out that the test under the Federal Employers' Liability Act is simply whether the proofs justify, with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. In applying the rule of the *Rogers* case, the courts, nonetheless, clearly indicate that there must still be a judicial appraisal as to the sufficiency of evidence to support a jury verdict. *Shea* v. *New York, New Haven & Hartford Railroad Co.*, 316 F. 2d 838.

It is, therefore, true that the *Rogers* rule still permits a court in a Federal Employers' Liabiiity Act action to deny causation as a matter of law where the proofs do not justify with reason the conclusion that employer negligence

played any part, even the slightest, in producing the injury or death of the railroad employee. This principle is illustrated in the case of *Inman* v. *Baltimore & Ohio Railroad Co.* (1959), 361 U.S. 138, 4 L. Ed. 2d 198, 80 S. Ct. 242, in which the evidence showed that the plaintiff, a nighttime crossing watchman stationed at defendant's railway intersection, was injured about midnight when an automobile driven by an intoxicated person ran into him from behind while he was flagging traffic for a passing train. A judgment on the verdict in plaintiff's favor was reversed by the Court of Appeals of Ohio and the Supreme Court of Ohio dismissed plaintiff's appeal. The United States Supreme Court affirmed on the ground that the evidence justified the conclusion that negligence on the part of the employer could have played no part in plaintiff's injury. This was in spite of the argument adopted by the dissenting judges that the jury might have found that the railroad was negligent in not assigning a part of the plaintiff's duties to someone else or not installing mechanical devices to stop traffic.

In *New York, New Haven & Hartford Railroad Co.* v. *Henagan* (1959, C.A. 1, Mass.), 272 F. 2d 153, rev. 364 U.S. 441, 5 L. Ed. 2d 183, 81 S. Ct. 198, the Supreme Court reversed a decision of this court where the evidence showed that the plaintiff, a waitress in the grill car of one of the defendant's trains, sued for injuries allegedly sustained when an emergency application of the brakes brought the train to a sudden stop. The engineer made the emergency application of the brakes in an unsuccessful effort to stop the train before it reached one who stepped off the tracks of the station in an attempt to commit suicide. This court affirmed a judgment on the verdict of the plaintiff stating that in recent years the Supreme Court allowed juries great latitude in deciding what may or may not be a reasonable conclusion to draw from the evidence in Federal Employers' Liability Act cases, citing the *Rogers* case for the proposi-

tion that only the barest possibility of causation is enough to make out a case for the jury. The Supreme Court, however, reversed the verdict holding that the proofs were insufficient to submit to the jury the question of whether the employer played a part in the emergency application of the brakes which allegedly produced plaintiff's injury.

In reliance on the *Rogers* rule, a judgment for defendant, notwithstanding the verdict for the plaintiff, was rendered in *Rubley* v. *Louisville & Nashville Railroad Company* (1962, D.C. Tennessee), 208 F. Supp. 798, a Federal Employers' Liability Act action in which the plaintiff claimed that the place where he worked was unsafe and that the railroad was negligent in failing to inaugurate a conservation sound program in failing to ascertain that the plaintiff's hearing was being affected by prolonged noise from the engines and to furnish him with earplugs.

A judgment for defendant, notwithstanding the verdict for the plaintiff, was also affirmed in *Dessi* v. *Pennsylvania Railroad Co.* (1958, C.A. 3, Pennsylvania), 251 F. 2d 149; cert. den. 356 U.S. 967, 2 L. Ed. 2d 1073, 78 S. Ct. 1006. In that case the plaintiff was rendered unconscious just after he had jacked up one corner of a railway car. Neither he nor his helper nor anyone else saw or knew just what happened. It was the plaintiff's theory that one of the possibilities under the evidence was that the handle of the jack suddenly moved in such a way as to strike the plaintiff and knock him unconscious. Recognizing the *Rogers* rule the court pointed out that under that rule the role of defendant's negligence in helping to bring about the injury may be small, but that the rule does not suggest that a Federal Employers' Liability Act plaintiff can carry his burden of proof without evidence that the negligence of the defendant was real; that the repeated use of the phrase "was reasonable" in the *Rogers* rule is a persuasive indication that the Supreme Court intended no departure

from the familiar and normal requirements of federal jurisprudence that the party with the burden of proof must present facts from which negligence and the causal relationship could reasonably be inferred.

Thus, the railroad's negligence was held too far removed, both in space and time, from the employee's injury to meet the causation requirements of the Federal Employers' Liability Act in *Nicholson* v. *Erie Railroad Company,* (1958, C.A. 2d, New York), 253 F. 2d 939, where it appeared that the plaintiff's post of duty was in New Jersey and that she lived in New York. She was accustomed to travel back and forth on the defendant's train, using the Jersey City station; she was the only woman employee in the shops and there was no women's toilet so she was accustomed to use the lavatory in any one of the cars standing on tracks adjoining the shop awaiting use; on the day of the accident she would have taken the bus to the station from which the train would leave except that she wanted to use the toilet and so she went into the yard; the foreman of the yard brought her to an empty train which was going right down to the station; she used the lavatory in the train; by the time she came out the train had started and reached the station and passengers were jumping on while it was going; she waited until the train stopped and was injured by being struck with something like a suitcase which a passenger was carrying. The theory was that because of defendant's failure to afford her toilet facilities she was forced to and did use for that purpose the lavatory in the car in which she was injured. A judgment dismissing her complaint for failure to state a cause of action under the act was affirmed on appeal. The court pointed out that, even if there was evidence sufficient to take the question of negligence to the jury, still the court below was correct in dismissing at the close of the evidence since the causation requisite for recovery under the act was lacking. The court stated that to impose liability on the defendant, the negli-

gence need not be the proximate cause of the injury; that the act has its own rule of causation, and that the injury need only be one resulting in whole or in part from the negligence of the employer and that under the *Rogers* rule the question of causation is one for the jury if the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury. The court also recognized that in speaking literally it could not be denied that defendant's failure to supply toilet facilities played a part in producing plaintiff's injury. However, the court pointed out that it is not enough that the injury would have happened but for the negligence of the defendant since there must be some causal connection.

See also *Simpson* v. *Texas & New Orleans Railroad Co.* (1962, C.A. 5, La.), 297 F. 2d 660, where the District Court's dismissal of a complaint filed by a railroad employee was affirmed.

The decision in this case by the Circuit Court of Appeals clearly recognizes the issues involved, and the decision itself logically follows the principles enunciated in the prior decisions of the United States Supreme Court and the Circuit Court itself.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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